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August 10, 2007

BY E-MAIL AND FIRST CLASS MAIL

Hon. John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: RNC Subpoena

Dear Chairman Conyers:

We write on behalf of our client, the Republican National Committee ("RNC"), in response to your August 2, 2007 letter. You expressed concern because the RNC is abiding by the White House's instructions to withhold certain documents (referred to in your letter as "Category Two documents").

In a letter dated July 31, 2007, the White House Counsel's Office stated its position that those documents appear to be outside the scope of the Committee's "investigative authority, which is limited to areas in which Congress may legislate," and instructed the RNC not to produce the Category Two documents at this time. Accordingly, the RNC is awaiting a determination by the White House as to whether it will invoke executive privilege over those documents. In the meantime, the RNC is proceeding deliberately and cautiously by withholding them pending the outcome of the White House's discussions with the Committee and the White House's decision concerning invoking the privilege.

To the extent it would facilitate resolving the dispute over the status of the Category Two documents, the RNC would, of course, be willing to accept your invitation to meet with your staff, together with representatives of the White House Counsel's Office, to discuss these issues in greater detail.

We respectfully but strongly disagree with your suggestion that the RNC must produce documents in its possession notwithstanding the White House's instructions to withold them. The President has already asserted executive privilege over the vast majority of the documents in the RNC's possession that are responsive to the subpoena served by the Committee on the RNC (referred to in your letter as the "Category One documents"), and we understand that the White House is continuing to evaluate whether to assert executive privilege over the remaining documents (the "Category Two documents"). Such an assertion of executive privilege is a very serious matter that the RNC cannot take lightly.

Indeed, the Supreme Court has described executive privilege as "fundamental to the operation of Government" and necessary "for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see also id.* ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."). For this reason, the Supreme Court has held that the Judiciary is to afford "great deference" to the "President's need for complete candor and objectivity from advisers" as expressed through the assertion of executive privilege. *See id.* at 706. We believe similar respect is warranted by the RNC here because to proceed as the Committee is suggesting could seriously undermine this important privilege.

The RNC's careful decision to defer to the President's assertion of executive privilege is supported in the case law. Although, as you know, there is relatively little case law concerning disputes of this kind, partly because such disputes are often resolved by negotiation and partly because the courts themselves are appropriately reluctant to take sides between the contending branches, the most analogous cases support the principle that third parties such as the RNC are justified in withholding potentially-privileged documents based on instructions from the privilege holder. In *United States v. Tobin*, 195 F.Supp. 588 (D.D.C. 1961), *rev'd on other grounds*, 306 F.2d 270 (D.C. Cir. 1962), for example, the U.S. District Court for the District of Columbia acknowledged that a party subpoenaed by Congress may in certain circumstances refuse to produce documents if a third-party (in that case, the Governors of New York and New

Jersey) instructed the subpoenaed party to withhold them on executive privilege grounds. *See id.* at 615. We believe the RNC's decision to defer to the President's assertion of executive privilege is particularly appropriate here in light of the absence, short of a contempt proceeding, of a meaningful opportunity for the RNC to obtain judicial relief if a negotiated agreement cannot be reached.[1]

Furthermore, in *AT&T*, which you cited in your letter, the U.S. Court of Appeals for the D.C. Circuit recognized that the President maintains an interest in privileged documents subpoenaed by Congress even when those documents are in the possession of a third party entity outside the Executive Branch. *See United States v. AT&T*, 551 F.2d 384, 393-94 (D.C. Cir. 1976) (noting that dispute over documents in AT&T's possession would ultimately be decided by "balanc[ing] the legislative and executive interests asserted" and explaining that executive interests included the need to keep information confidential that "relates to the effective discharge of a President's powers"). In light of the President's unquestionable interest in the documents in the RNC's possession, therefore, it would be inappropriate and unreasonable for the RNC to disclose them here, absent the President's consent.

Finally, it is worth emphasizing that, as the D.C. Circuit noted in *AT&T*, these kinds of disputes between Congress and the President create a potential for "historic confrontation" between two co-equal branches of government. *Id.* at 394. Given the stakes and the weighty interests of both branches, the Court of Appeals in *AT&T* took care not to involve itself unnecessarily until the parties had exhausted every opportunity to work out a solution among

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[1] Your letter suggests that the RNC must do what AT&T did in *United States v. AT&T* and agree to produce the documents to Congress. You imply that the President, then, would be able to bring a lawsuit against the RNC, his own political party, seeking to enjoin production of the documents. But the fact that AT&T agreed to produce documents to Congress in that case says nothing about whether the RNC has a legal obligation to do so here. That issue was never before the *AT&T* court and there is no language in the opinion, dicta or otherwise, that suggests that a subpoenaed party has an obligation to produce documents to Congress when the President asserts executive privilege.

themselves. *Id.* It is appropriate and prudent for the RNC to follow the same course here. As we have repeatedly emphasized, once the dispute between the White House and the Committee is resolved -- either through an agreement or through a final court order -- the RNC is fully prepared to comply with the terms of the resolution.

Respectfully submitted,

Robert K. Kelner

cc: Hon. Lamar S. Smith